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IN THE

Supreme Court of the United States

October Term, 1942.

No. 13 ORIGINAL

Ex Parte Republic of Peru,

Owner of the Peruvian SS. UCAYALI.

Return of Wayne G. Borah, One of the Judges of the District Court of the United States for the Eastern District of Louisiana, to the Rule Issued Herein by the Supreme Court of the United States on January 18, 1943, to Show Cause why Leave to File the Petition for a Writ of Prohibition and/or Mandamus Herein Should Not be Granted.

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I, Wayne G. Borah, one of the Judges of the District Court of the United States for the Eastern District of Louisiana, in obedience to the rule herein issued out of this court on the 18th day of January, 1943, (a certified copy of which was attached to the petition sent to me by the marshal of this court), directing me and/or the judges and officers of the District Court of the United States for the Eastern District of Louisiana to show cause why leave to file the petition herein for a writ of prohibition and/or mandamus should not be granted in accordance

with the prayer of said petition, do hereby certify and make the following return to this Honorable Court:

The writ of prohibition and/or mandamus should be denied because of the facts disclosed by the record in this case and for the facts and reasons stated in my opinion herein set out in the transcript, pages 92-97, which opinion is made part of this return as if fully set out herein.

If it be necessary for me to be formally represented by counsel in the Supreme Court, I hereby appoint Jos. M. Rault, one of the proctors for Galban Lobo Co., S. A., libelant in the district court, as said attorney.

And having fully answered on behalf of myself and the District Court of the United States for the Eastern District of Louisiana and the judges and officers thereof, I pray that said writ may be denied and that we may be hence dismissed.

In witness whereof I, Wayne G. Borah, one of the judges of the District Court of the United States for the Eastern District of Louisiana, have hereunto set my hand and the seal of said court on this 5th day of February, 1943.

WAYNE G. BORAH,

United States District Judge.

(Seal of District Court of the United States for the Eastern District of Louisiana.)

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BRIEF ON BEHALF OF GALBAN LOBO CO.

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In the Matter

of the

Petition of the Republic of Peru, Owner of the Peruvian Steamship "UCAYALI", for a Writ of Prohibition and/or a Writ of Mandamus against the Honorable Wayne G. Borah, Judge of the District Court of the United States for the Eastern District of Louisiana, New Orleans Division, and the Other Judges and Officers of said Court.

BRIEF ON BEHALF OF GALBAN LOBO CO., S. A., LIBELANT IN THE DISTRICT COURT.

TERRIBERRY, YOUNG, RAULT & CARROLL,
MICHELSEN & CHAMBERLAIN,
Proctors for Galban Lobo Co., S. A.

JOS. M. RAULT,
GEO. H. TERRIBERRY,
WALTER CARROLL,
Of Counsel:

JOS. M. RAULT,

Attorney for Wayne G. Borah, Judge of the District Court of the United States for the Eastern District of Louisiana, Respondent in Rule.

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IN THE

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BRIEF ON BEHALF OF GALBAN LOBO CO., S. A., LIBELANT IN THE DISTRICT COURT.

HISTORY OF PROCEEDINGS.

For greater clarity and certainty, we think it desirable to restate the facts of this case. They are set out in some detail in the affidavit of Jos. M. Rault (R. 62-68).

On November 18, 1941, at Callao, Peru, a charter party was entered into between Compania Peruana de Vapores y Dique del Callao (referred to as La Compania) and Mr. Enrique Pardo of Lima, charterer, the agent in Peru of Galban Lobo Co., S. A., a Cuban corporation, whereby La Compania agreed to let and Pardo agreed to hire the Peruvian SS UCAYALI for a voyage from ports in Peru to the port of New York, for the carriage of sugar. No reference was made in that charter to the Republic of Peru, nor to its alleged ownership of the vessel. Indeed, in clause 6 of the charter party, in which the contracting parties bound themselves, La Compania referred to "its freight and its steamer". (R. 66.)

Approximately 3600 tons of sugar in bags was loaded on the UCAYALI at Peruvian ports under this charter party and bills of lading therefor issued by La Compania. None of these bills of lading made any reference to the Republic of Peru or to its alleged ownership of the vessel. La Compania in all respects acted as owner (R. 66, 84, 90).

On arrival of the SS UCAYALI at Balboa about March 11, 1942, the officers of the ship had a meeting with the master and decided that they would not go to New York because of the submarine sinkings on the Atlantic coast. Through the vessel's agent and the Peruvian Consul they transmitted this definite decision to Peru and were then verbally instructed to proceed to New Orleans (R. 81, 82). There is no authentic evidence to show that these instructions came from the Peruvian government, although the master claims that the Peruvian Consul told him he had instructions from the Government of Peru. No written orders of any kind were given the master. About March

23rd the SS UCAYALI arrived at New Orleans and there proceeded to discharge her cargo, contrary to the terms of the charter party and the instructions of Galban Lobo Co.

On March 30, 1942, Galban Lobo Co., S. A., filed its libel in the United States District Court at New Orleans against Compania Peruana de Vapores y Dique del Callao, alleged on information and belief to be the owner of the UCAYALI, and against the UCAYALI, seeking to recover damages in the amount of $100,000.00 growing out of the breach of the charter party between libelant's agent in Callao and La Compania. Admiralty process *in rem* was issued against the UCAYALI, which was seized by the United States Marshal on March 31st. She remained under seizure until she was released on bond.

The Republic of Peru for the first time injected itself into the matter on April 9, 1942, when a sworn claim was filed by it in which it alleged itself to be the owner of the UCAYALI and stated that it "prays to defend accordingly" (R. 17). This claim further stated "the filing of this claim is not a general appearance and is without prejudice to or waiver of all defenses and objections which may be available to respondent and claimant, particularly but not exclusively sovereign immunity".

On the same day a surety release bond, dated April 9th, in the amount of $60,000.00, whereon the Republic of Peru was principal and the National Surety Company was surety, was filed for the release of the UCAYALI (R. 53). This bond though containing a reservation identical with

that contained in the claim was otherwise in the usual form, the condition of the bond being

> "that if said claimant and surety abide by all the orders interlocutory or final of the court and pay the libelant the amount awarded by final decree rendered in the court to which the process is returnable, or in any appellate court, then the foregoing obligation is to be voided, but otherwise it will remain in full force and effect."

We were advised by proctors for the Republic of Peru that they desired to take the testimony of the master of the UCAYALI. We attended at their office in New Orleans on April 11, 1942, at which time the testimony of Francisco Olsen, master of the UCAYALI, was taken on the merits of the case.

Before the testimony began, Mr. Nicholas Callan, of the firm of Monroe & Lemann, proctors for the Republic of Peru, stated as follows (R. 69-70):

> "Mr. Callan:
>
> "The testimony of Francisco Olsen, the master of the Peruvian Steamship Ucayali, is taken with full reservation and without waiver of all defenses and objections which may be available to respondent and claimant, particularly but not exclusively sovereign immunity; and the appearance of counsel for the Government of Peru and the Steamship Ucayali is for the special purpose only of taking the testimony of the master under the reservation aforesaid."

Mr. Rault, as proctor for libelant, then stated as follows:

> "Mr. Rault:
>
> "I agree to the taking of the testimony of the master by consent at the offices of Messrs. Monroe &

Lemann on Saturday, April 11, 1942, and agree to waiving, signing, sealing, certification and filing and all the other formalities provided by the de bene esse statute. I, however, do not agree to any reservation or attempted reservation as to the plea of sovereign immunity or any other plea that may in fact be waived by the taking of the testimony of the master."

Francisco Olsen, having been duly sworn, began his testimony on direct examination as follows:

"Direct Examination.

"Mr. Callan:

"Q. Captain, you are the master of the Steamship Ucayali?

"A. Yes, sir."

Mr. Rault then, on behalf of libelant, made the following statement:

"Mr. Rault:

"I wish to say, on behalf of libelants, that we shall take the position that the testimony of the Captain of the Ucayali and the appearance of counsel is a general appearance and waiver of any plea of sovereign immunity, or any plea connected therewith."

Mr. Callan then proceeded with the direct examination of the master, in which there were brought out many facts dealing with the merits of the litigation. During the course of the testimony the Republic of Peru, through Mr. Callan, put in evidence six exhibits marked respectively Peru Exhibits 1 to 6, inclusive, being as follows (R. 76-77):

1. Peru Exhibit 1, charter party covering the Ucayali between La Compania Peruana de Vapores y Dique del Callao and Mr. Enrique Pardo of Lima (alleged by libelant to be its agent);

2. Peru Exhibits 2, 3, 4, 5, and 6, bills of lading issued by the Compania Peruana de Vapores y Dique del Callao covering cargo loaded by the Ucayali at various ports.

The return day on which answer or other pleading was due by the claimant and respondent in accordance with the rules of court was April 20, 1942.

On April 18th "the Republic of Peru, respondent and claimant, through its Proctors, Monroe & Lemann", on *ex parte* motion obtained the following order from the court (R. 20):

> "On motion of Republic of Peru, respondent and claimant, through its proctors, Monroe & Lemann, who appear herein for the special and limited purpose of presenting this motion and with full reservation and without waiver of any defenses and objection which may be available to mover, particularly but not exclusively, sovereign immunity, and on suggesting to the Court that the return day to answer or otherwise plead to the libel herein expires on April 20th, and on further suggesting to the Court that mover requires an extension of at least twenty (20) days to present fully and adequately its pleas and defenses to said libel, particularly, but not exclusively, the defense of sovereign immunity;
>
> "It is Ordered that the time to answer or otherwise plead to the libel filed herein be and the same is hereby extended for a period of twenty (20) days from April 20th, 1942.
>
> "New Orleans, La. April 18, 1942.
> (Signed) A. J. CAILLOUET,
> Judge."

It will be noted that the motion requested the Court for an extension of 20 days:

> "to present fully and adequately its pleas and defenses to said libel, particularly, *but not exclusively,* the defense of sovereign immunity;" (Italics ours.)

and that the order as prayed for by the Republic of Peru gave the requested extension of 20 days:

> *"to answer or otherwise plead* to the libel filed herein" (Italics ours).

On May 8th and May 29, 1942, further *ex parte* motions were filed by the "Republic of Peru", and further orders of court in similar terms obtained granting additional extensions.

On June 17th the proctors for the Republic of Peru, appearing specially, moved the court to dismiss the libel for want of jurisdiction, on the ground that the suit was against the vessel of a friendly foreign sovereign.

On June 29th the United States Attorney, under instructions of the attorney general and of the State Department, filed a suggestion of immunity and asked that the UCAYALI be declared immune from seizure and be released.

On July 7th Galban Lobo Co., S. A., filed its answer and return to the suggestion of immunity and the motion to dismiss (R. 58). It denied that the UCAYALI was not subject to the jurisdiction of the court, or immune from seizure, and averred that if the UCAYALI was the property and in the possession of the Republic of Peru at the

time of the filing of the libel, any immunity to which she may have been entitled at that time had been waived by actions in this case by the Republic of Peru, which constituted a general appearance, to-wit:

(a) By filing as respondent and claimant a claim to said vessel;

(b) By filing a surety release bond agreeing to "abide by all the orders, interlocutory and final, of the court and pay the libelant the amount awarded by the final decree rendered in the court to which the process is returnable, or in any appellate court".

(c) By taking, over the objection of libelant, the testimony of the master of the UCAYALI on the merits of the case, and by offering in evidence through this witness the charter party and bills of lading, the terms of which are alleged to deal with the merits of the case;

(d) By filing *ex parte* motions for and obtaining and filing orders of court extending "the time to answer or otherwise plead to the libel". (R. 58-60.)

The matter, on July 8th, was submitted to the district judge on argument and briefs. On October 13th the court handed down its opinion holding that the actions of the Republic of Peru constituted a general appearance and that the plea of sovereign immunity had been waived. The opinion of the court is found in the record at pages 92-97 It is reported in 47 F. Supp. 203, 1942 A. M. C. 1479. The matter was later reargued on an application for rehearing, which was denied on November 18th.

POINT I.

A Sovereign Waives the Plea of Sovereign Immunity by Any Action in the Case that Constitutes a "General Appearance".

The plea of sovereign immunity "is a personal privilege which it (the sovereign) may waive at pleasure". *Clark v. Barnard,* 108 U. S. 426.

This court has said in *Porto Rico v. Ramos,* 232 U. S. 627, 631, "* * * The immunity of a sovereign from suit without its consent cannot be carried so far as to permit it to reverse the action invoked by it and to come in and go out of court at its will, the other party having no right of resistance to either step."

In this case the attorney general of Porto Rico in a suit to which that sovereign was not a party appeared on behalf of the people of Porto Rico and represented to the court that the people of Porto Rico were interested parties to the action. The court thereupon ordered the people of Porto Rico made a party defendant. Later the attorney general appeared specially and challenged the jurisdiction of the court on the ground of sovereign immunity. This court held that Porto Rico, having been made a party defendant on its own motion and having made a general appearance, could not thereafter challenge the jurisdiction of the court.

The doctrine asserted in the *Ramos* case has been recognized under varying facts and circumstances, in:

Richardson v. Fajardo Sugar Co., 241 U. S. 44;
Luckenbach Steamship Co. v. Barque THEKLA, 266 U. S. 328;
Veitia v. Fortuna Estates, (1st C. C. A., 1917), 240 Fed. 256, 262;
Dexter and Carpenter v. Kunglig Jarnvagsstyrelsen, (2d C. C. A., 1930) 43 Fed. (2d) 705;
United States v. National City Bank of New York, (2d C. C. A., 1936), 83 Fed. (2d) 236, 238.

It is not limited to those cases in which the sovereign has made a voluntary appearance. It has repeatedly been recognized as applicable to those cases in which the sovereign has taken action in court inconsistent with the claim of a special appearance made solely for the purpose of challenging the jurisdiction of the court.

Ervin v. Quintanilla, (5 C. C. A., 1938), 99 Fed. (2d) 935, cert. den. 306 U. S. 635;
The SAO VICENTE, (2d C. C. A., 1922), 281 Fed. 111;
The SAO VICENTE, (3d C. C. A., 1924), 295 Fed. 829;
The MANGALIA, (S. D. N. Y.), 1942 A. M. C. 35; and Cases cited under Point III.

In *Ervin v. Quintanilla,* which involved a plea of sovereign immunity by the Republic of Mexico, the Circuit Court of Appeals for the Fifth Circuit said (page 338):

"We of course agree with appellant that a sovereign may waive his claim of immunity and subject himself

> to a jurisdiction which, but for his submission, he would be immune from. He may do this by a general appearance, or by acts or conduct inconsistent with the claim of a special appearance made for the purpose, alone, of raising the jurisdictional question. Cases of that kind are The Sao Vicente, 3 Cir., 295 F. 829; Dexter & Carpenter v. Kunglig, 2 Cir., 43 F. 2d. 705."

The *Quintanilla* case was cited with approval by the Supreme Court of New York, Appellate Division, in *Field v. Predionica I. Tkranica A. D.*, 31 N. Y. S. 2nd 739, 263 N. Y. App. 158. In holding that the Royal Yugoslav legation should be granted leave to intervene by special appearance to assert its claim of ownership and sovereign immunity in respect of certain cotton that was under seizure, the Appellate Division commented on waiver of sovereign immunity, saying (page 743):

> "A sovereign may waive his claim of immunity and subject himself to jurisdiction by a general appearance, or by conduct on his part inconsistent with a special appearance." (Citing Ervin v. Quintanilla.)

POINT II.

Any Action by the Sovereign which is not Solely for the Purpose of Challenging the Jurisdiction of the Court is a General Appearance Irrespective of Any Attempted Reservation in the Terminology of the Pleading.

2 Ruling Case Law, 327:

> "When a defendant intends to rely on want of jurisdiction over his person he must appear if at all for the sole purpose of objecting to the jurisdiction of the court. An appearance for any other purpose is usually considered general. If the appearance is a general one, the fact that it is expressly limited by its terms as special does not prevent it from being general, as all appearances are presumed to be general."

By overwhelming authority the following propositions are established:

1. An appearance is special where it is made for the *sole* purpose of objecting to the jurisdiction of the court. *6 C. J. S.* page 6; *4 C. J.* page 1316, and cases cited in notes.

2. The nature of an appearance as general or special is not controlled by the designation given it by the appearing party. It is what the appearing party does rather than what he says that counts. *6 C. J. S.* page 7; *4 C. J.* page 1317, and cases cited in notes.

> "The fact that an appearance is styled as special will not save it from being declared general if a con-

sideration of the substance discloses that the appearance was made for a purpose or purposes other than to question the jurisdiction of the court over the appearing party." *6 C. J. S.* page 8.

3. Appearances in the absence of anything to the contrary are presumed to be general. The only effect of designating an appearance as special is to rebut this presumption. *6 C. J. S.* pages 7 and 8; *4 C. J.* pages 1317, 1318, and cases cited in notes.

In *Crawford v. Foster*, 84 Fed. 939 (C. C. A. 7), the law is stated thus (syllabus):

> "A special appearance for the purpose of objecting to the jurisdiction becomes general if the defendant then disputes the merits of the cause and no words of reservation can make an appearance special which is in fact to the merits."

In *Massachusetts Bonding & Insurance Company v. Concrete Steel Bridge Co.*, (C. C. A. 4), 37 Fed. (2d) 695, the Court at page 701, quoted with approval the following language from *Dailey Motor Company v. Reeves*, 184 N. C. 260, 114 S. E. 175, 176:

> "Whether an appearance is general or special does not depend on the form of the pleading filed, but on its substance. If a defendant invoke the judgment of the court in any manner upon any question, except that of the power of the court to hear and decide the controversy, his appearance is general. There are cases where the defendant may make a quasi appearance for the purpose of objecting to the manner in which he is brought before the court, and in fact to show that he is not legally there at all, but if he

ever appears to the merits he submits himself completely to the jurisdiction of the court and must abide the consequences. If he appears to the merits, no statement that he does not will avail him, and if he makes a defense which can only be sustained by an exercise of jurisdiction, the appearance is general, whether it is in terms limited to a special purpose or not."

See also *Stirling Tire Corporation v. Sullivan,* (C. C. A. 9), 279 Fed. 336; *Ruksdell v. Star,* (S. D. Cal.), 13 Fed. (2d) 478. There is overwhelming authority to support the conclusion of the District Judge (R. 96):

"In determining whether there has been a general appearance or submission to the jurisdiction the intent of the pleader is to be determined not by what he says but by the nature of what he does. As was said in Murphy v. Herring-Hall-Marvin Safe Co., 184 Fed. 495, 'The effect is not to be deduced from what the party may have intended but from what he did. It is the act which speaks, and not the secret purpose.'"

Petitioner in its brief, Point 4, appears to take the position that these principles which are admittedly applicable to private litigants cannot be held as controlling the actions of a sovereign in court. We know of no authorities to this effect, and we find none in petitioner's brief.

Indeed, in *Ervin v. Quintanilla, supra,* the Circuit Court of Appeals for the Fifth Circuit declared the law to be as follows (page 938):

"Courts have rightly refused to permit persons or sovereigns not subject without their consent to the

jurisdiction of the court, to come in and out of a court at will. They have thus uniformly held that where jurisdiction has been invoked or has been submitted to by a general appearance, there can be no later assertion of immunity and withdrawal. Porto Rico v. Ramos, 232 U. S. 627, 34 S. Ct. 461, 58 L. Ed. 763; Kingdom of Roumania v. Guaranty Trust, 2 Cir., 250 F. 341, Ann. Cas. 1918E, 524, and cases cited. They have also held that whether there has been a general appearance or submission to the jurisdiction is to be determined by the nature of the acts done and the intent with which they were done, giving effect in this determination, of course, to the principle that actions are intended to have their usual and natural consequences, and that a litigant will not be heard to say that he did not intend the natural consequences of clear and unequivocal acts."

If the actions of the Republic of Peru in this case were not in fact for the *sole* purpose of challenging the jurisdiction of the district court, then the appearance of the Republic of Peru was general and not special and it subjected itself to the jurisdiction of the court in spite of any verbal reservations made.

POINT III.

The Actions of the Republic of Peru in (a) Filing Claim to the Vessel, (b) Filing a Corporate Surety Release Bond, (c) Taking the Testimony of the Master on the Merits of the Case, and (d) Applying for and Obtaining Orders of Court Extending its Time within which "to Answer or Otherwise Plead" to the Libel Constituted a General Appearance.

The Republic of Peru by filing claim and bond substituted for the vessel the sovereign as claimant and the National Surety Corporation as surety as parties respondent in the case and "prayed to defend accordingly". The bond by its specific terms submitted the claimant and the surety to "all of the orders interlocutory or final of the court." Neither the claim nor the bond was devoted exclusively to challenging the jurisdiction of the court. They were actions of a general nature such as any owner would be required to take in order to regain possession of property under seizure in rem in the admiralty court. They invoked the power of the court not for the purpose exclusively of challenging the jurisdiction but for the purpose of obtaining the property and removing it from the jurisdiction. Petitioner urges that it was necessary at once to release the SS UCAYALI from the libel so that the vessel might engage in the transportation of materials and supplies for the United States government. No such representation was made in the claim or bond. Neither document was devoted *exclusively* to laying a foundation for the plea of sovereign immunity. The Republic of Peru sought in the claim and bond to release the ship and at

the same time to reserve to itself the right either of pleading to the merits or of pleading sovereign immunity. Both documents (R. 17, 54) contain the phrase "without prejudice and waiver of *all* defenses and objections which may be available to respondent and claimant particularly *but not exclusively* sovereign immunity". (Italics ours.)

Petitioner's position would be quite different and much stronger if in both the claim and the bond it had stated that it was appearing specially and exclusively for the purpose of pleading sovereign immunity and if it had inserted in the bond a provision that the bond be void if the plea of immunity was maintained.

Assuming, however, *arguendo* (as did the district judge) that respondent's action in claiming and bonding the UCAYALI did not amount to a general appearance, there is no escape from the conclusion that respondent entered a general appearance by taking the testimony of the master for use in the trial of the case on the merits (over the specific objection of libelant), and by filing *ex parte* motions for extensions of time within which "to answer or otherwise plead to the libel". Respondent requested the extensions "to present fully and adequately its pleas and defenses to said libel particularly *but not exclusively* the defense of sovereign immunity" (Italics ours). Three extensions were obtained, one for twenty days on April 18th, another for twenty days on May 8th, and a third for twenty days on May 29th.

Petitioner urges that these extensions were necessary so that it might perfect the formalities prerequisite to the filing of the plea of sovereign immunity, and that the

time was required because of the necessity for communication between Peru and Washington to obtain instructions for the Peruvian Embassy at Washington to make representations to the American Department of State, the necessity that the Department of State make appropriate requests of the Attorney General, and for the latter to instruct the United States Attorney for the Eastern District of Louisiana.

The argument of necessity, if in law it avails petitioner anything, is without merit and based upon a false assumption, because it ignores the alternate course which was open to the Republic of Peru. The respondent did not have to wait for action by the State Department and the Department of Justice. The Peruvian ambassador himself could have filed a suggestion in court before the return day asserting the alleged public status of the vessel and claiming her immunity to suit, as was done in *The NAVEMAR*, 303 U. S. 68. It is true that the suggestion would not have been conclusive and that the ambassador would have had to present proof in support of his contentions, as any other claimant in a court of the United States, but this procedure would have given the respondent ample time to have the State Department request the Deparment of Justice to instruct the United States Attorney to file the plea of immunity. But respondent did not choose to take this course, although there was ample time between the filing of the libel and the return day within which to do so. The vessel was seized on March 31st. The claim and bond were filed on April 9th. The testimony of the master of the UCAYALI was taken by respondent on the merits on April 11th. The return day

was April 20th. The record shows that the Peruvian Ambassador had received his instructions from his government to plead sovereign immunity at least five days prior to the original return date. On April 15th he presented a formal note to the State Department asking that the Department of Justice be instructed to file a suggestion of sovereign immunity in this case (R. 47, 48).

Thus when the power of the court was invoked to grant the first extension order on April 18th, the Peruvian Ambassador was fully authorized and instructed to plead sovereign immunity and could have made a special appearance in court in his own person without waiting for the Department of Justice to act. The *ex parte* orders granting extensions were thus obtained by the Republic of Peru freely and voluntarily.

The respondent, without necessity and to suit its own purpose, invoked the power of the court to grant that which only a court vested with jurisdiction could grant—an extension of time within which "to answer or otherwise plead" to the libel.

Two days after the UCAYALI had been released, respondent took the testimony of the master of the vessel on the merits of the case. This was done over the objection of proctor for the libelant that the taking of this testimony and appearance of counsel for the Republic of Peru constituted a general appearance and was a waiver of the plea of sovereign immunity (R. 69-70). It is difficult to conceive of an action in litigation that is more general in its nature than the taking of the deposition of a witness on the merits. If this court sustains the district

judge in holding that the plea of sovereign immunity has been waived, the testimony of this witness practically in its entirety will be used by the Republic of Peru to support its defenses to the libel as set out in the answer that it will file. Petitioner urges that the deposition was taken because the Republic of Peru considered it imperative on account of war conditions to perpetuate the testimony of the master. This if true is not a legal excuse. On the same theory petitioner could have taken the testimony of all of the witnesses on the UCAYALI and for that matter, if it thought it desirable, of seamen on any other ships bound for sea. It had its choice of resting on its plea of sovereign immunity, or of proceeding with the merits of the case thereby making a general appearance. Of its own volition it chose the latter course, and must bear the legal consequences which follow. It cannot blow both hot and cold. It may be noted in passing that the urgency of taking this testimony was not as great as is suggested by petitioner. If the master was unavailable, other witnesses could have proved what he testified to. The conference on board ship at which the definite decision not to proceed to New York was made was attended not merely by the master but also by the chief officer, the second officer, the chief engineer, and the purser (R. 81). The charter party was annexed to the libel and did not require proof by respondent. The bills of lading could have been proved by other witnesses.

Admittedly the purpose of taking the testimony of the master was to conserve that testimony for use as a defense on the *merits* of the case. It had nothing whatsoever to do with the challenge to the jurisdiction of the court.

Pretermitting the effect of filing claim and bond, the obtaining of the orders of extension, and the taking of testimony on the merits over libelants' objection, as a matter of law constituted a general appearance and was a waiver of the plea of sovereign immunity.

The SAO VICENTE, 281 Fed. 111, (2nd C. C. A., 1922). The Portuguese Steamship SAO VICENTE was libeled for a repair bill. Transportes Maritimos do Estado filed a claim for the vessel alleging itself to be its sole owner. The claim was in substantially the same form as that filed by the Republic of Peru in the *UCAYALI* case, both claims praying "to defend accordingly".

On the same day the Transportes Maritimos filed a bond for the release of the ship, in which the claimant and surety agreed to "abide by all orders of the court, interlocutory or final, and to pay the amount awarded by the final decree". The condition of this bond was identical with that of the bond filed by the Republic of Peru.

Later an answer was filed by the Vice-Consul General of Portugal, in which he alleged that the Transportes Maritimos, was a department of the government of Portugal. The answer then pleaded sovereign immunity. Libelant excepted to the answer and was sustained in its position.

The facts in the *SAO VICENTE* case are identical with those in the *UCAYALI* case, except that no mention was made of reservation of the plea of sovereign immunity in the claim and answer, and except that in the *UCAYALI* case, the Republic of Peru, in addition took testimony on

the merits, and obtained *ex parte* orders extending its time to plead. As we have indicated above, the attempted reservation of the plea of sovereign immunity does not help the Republic of Peru. It is actions and not words that count.

On appeal, the decision of the district court was affirmed, the Circuit Court of Appeals on the issue of waiver saying (page 114):

> "Finally, if we were to pass by the questions already considered, appellant is confronted with a line of cases, of ruling authority, which have now clearly held that the immunity of the sovereign, being susceptible of waiver, is lost when the sovereign enters a litigation with a general appearance. In Beers v. State of Arkansas, 20 How. 527, 15 L. Ed. 991, in speaking of the consent of the state of Arkansas, the court said:
>
> > " 'And as this permission is altogether voluntary on the part of the sovereignty, it follows that it may prescribe the terms and conditions on which it consents to be sued, and the manner in which the suit shall be conducted, and may withdraw its consent whenever it may suppose that justice to the public requires it.'
>
> "But this expression must be read in connection with the particular facts of that case, as is illustrated by the following extract from Clark v. Barnard, 108 U. S. 436, at page 447, 2 Sup. Ct. 878, at page 883 (27 L. Ed. 780):
>
> > " 'The first question for determination on this appeal is that of jurisdiction raised first by the demurrer and afterwards by the answer of Clark, general treasurer of the state of Rhode Island, on

the ground that the suit was in effect brought against a state by citizens of another state, contrary to the Eleventh Amendment to the Constitution of the United States. We are relieved, however, from its consideration by the voluntary appearance of the state in intervening as a claimant of the fund in court. The immunity from suit belonging to a state, which is respected and protected by the Constitution within the limits of the judicial power of the United States, is a personal privilege which it may waive at pleasure; so that in a suit, otherwise well brought, in which a state had sufficient interest to entitle it to become a party defendant, its appearance in a court of the United States would be a voluntary submission to its jurisdiction, while, of course, those courts are always open to it as a suitor in controversies between it and citizens of other states. In the present case the state of Rhode Island appeared in the cause and presented and prosecuted a claim to the fund in controversy, and thereby made itself a party to the litigation to the full extent required for its complete determination. It became an actor as well as defendant, as by its intervention the proceeding became one in the nature of an interpleader, in which it became necessary to adjudicate the adverse rights of the state and the appellees to the fund, to which both claimed title. The case differs from that of Georgia v. Jesup, 106 U. S. 458, where the states expressly declined to become a party to the suit, and appeared only to protest against the exercise of jurisdiction by the court.'

"The underlying principle of Clark v. Barnard has been consistently followed. Gunter v. Atlantic Coast Line R. Co., 200 U. S. 284-289, 26 Sup. Ct. 252, 50 L. Ed. 477; Porto Rico v. Ramos, 232 U. S. 627, 34 Sup.

Ct. 461, 58 L. Ed. 763; Richardson v. Fajardo Sugar Co., 241 U. S. 44, 36 Sup. Ct. 476, 60 L. Ed. 879; Veitia et al v. Fortuna Estates, 240 Fed. 256, 262, 153 C. C. A. 182. As succinctly put by Mr. Justice McKenna in the Ramos Case, supra:

> "'The immunity of sovereignty from suit without its consent cannot be carried so far as to permit it to reverse the action invoked by it, and to come in and go out of court at its will, the other party having no right of resistance to either step.'"

The SAO VICENTE, 295 Fed. 829 (3rd C. C. A., 1924). This was a libel against the Portuguese Steamship SAO VICENTE for salvage services. The pleading situation was identical with that in the case of the same name in the Second Circuit, *supra*. Again after the vessel was claimed and bonded, sovereign immunity was pleaded in the answer. The Circuit Court of Appeals for the Third Circuit said (page 831):

> "Exceptions by the libelant to the claimant's answer were sustained by the district court on the ground that the claimant had entered a general appearance, and, having submitted itself to the jurisdiction of the court, it thereby had waived any right to appear specially at that late day for the purpose of attacking its jurisdiction.
>
> "We think the court was right on two grounds: First, because a sovereign may waive its immunity, and it is considered to have done so when it has entered litigation with a general appearance and when, as here, it has acted for a time and in a manner entirely consistent with such an appearance. Beers v. Arkansas, 20 How. 527, 15 L. Ed. 991; Clark v. Barnard, 108 U. S. 436, 447, 2 Sup. Ct. 878, 883, 27 L. Ed.

780; Richardson v. Fajardo Sugar Co., 241 U. S. 44, 36 Sup. Ct. 476, 60 L. Ed. 879; Porto Rico v. Rosaly, 227 U. S. 270, 33 Sup. Ct. 352, 57 L. Ed. 507; Porto Rico v. Ramos, 232 U. S. 627, 34 Sup. Ct. 461, 58 L. Ed. 763; Gunter v. Atlantic Coast Line, 200 U. S. 273, 284, 26 Sup. Ct. 262, 50 L. Ed. 477; The Sao Vicente (C. C. A.) 281 Fed. 111. We know of no more orderly way for a foreign government to consent to suit and submit to jurisdiction than by the voluntary act of entering a general appearance, and when this is followed by conduct permissible only under an appearance of that character, the sovereign must be held to have waived its immunity to suit. It will not suffice for it to change its attitude after the litigation is under way, * * *"

Petitioner remarks that in this case the court held that the procedure employed by the sovereign in making its plea for immunity was improper because it was made by the vice-consul general. This is beside the point. Both Circuit Courts of Appeals held that the filing of the claim and bond constituted a general appearance.

The MANGALIA, 1941 A. M. C. 1501 (commissioner's report); 1942 A. M. C. 35 (S. D. N. Y.). A libel for cargo damages was filed against the Roumanian Steamship MANGALIA. Through the vessel's agents counsel were employed on behalf of the Service Maritime Roumain, owners of the ship. Libelants took the testimony of the master of the MANGALIA. Proctors for the vessel cross-examined. The vessel's proctors made arrangements to release the vessel by the putting up of $26,000.00 in escrow in lieu of a release bond.

On the following day process in the suit was returnable, but was adjourned by consent of the proctors. The deposition of the chief officer was taken and he testified that the MANGALIA was owned by the Roumanian government. Later the proctors for the vessel were instructed to raise the question of sovereign immunity, which they did by special appearances thereafter filed.

Libelants contended that by the actions of the Service Maritime Roumain, through its counsel, the plea of sovereign immunity had been waived, and the court referred to a commissioner for determination, among other issues, that of waiver.

The commissioner found that Service Maritime Roumain, an agency of the Roumanian government, owned the vessel, and that there had been a waiver of sovereign immunity. We quote the syllabus *(1941 A. M. C. 1501)*:

> "After filing of a libel, the act of counsel for respondent or claimant in attending at the deposition of a witness and participating therein by putting cross-questions, and even more definitely the act of such counsel in taking the depositions of witnesses for the respondent or claimant amount to a general appearance for the respondent or claimant. It is too late thereafter to file a special appearance or to seek to claim that the respondent or claimant, as a foreign sovereign, is immune from process or suit."

He made the following conclusion of law (page 1503):

> "I advise the court that the suggestion of immunity herein has no bearing on the question of waiver, which is a matter for judicial determination."

Confirming the commissioner's report, the district judge said (1942 A. M. C. 35, 38):

> "A sovereign may waive immunity by acts or conduct inconsistent with a special appearance entered solely for the purpose of raising a jurisdictional issue if such acts or conduct spell out a general appearance. (Ervin vs. Quintanilla, 1938 A. M. C. 1459, 99 F. (2d) 935, cert. denied, 306 U. S. 635; Sao Vicente, 281 Fed. 111). The Commissioner has found as a fact that the acts of the proctors for the respondent constitute a general appearance and that 'having failed diligently to protect the defense of sovereign immunity and having actually proceeded with the defense on the merits', the respondent is bound by those acts since it has ratified them, thus waiving the defense of immunity."

The holding of the court was that the attendance of counsel at the taking of testimony and two appearances in court to request adjournment constituted a general appearance and a waiver of the plea of sovereign immunity. That there was no attempted reservation of the plea of sovereign immunity in connection with the taking of the testimony and the appearances in court is not an essential difference.

The UXMAL, 40 Fed. Sup. 258 (D. C. Mass., 1941). The Mexican SS UXMAL was libeled in a personal injury suit, and an Association that was operating the vessel for the government of Mexico secured her release on a stipulation and deposit of $7,500.00 whereby the Association submitted to the jurisdiction of the court and agreed to pay the amount of any final decree. About a year later the Mexican Ambassador filed a petition pleading sovereign

immunity. In denying the petition of the ambassador the court said (page 260):

> "In the case at bar, there was not only a general appearance by the Association, but it expressly submitted to the jurisdiction and entered into an engagement with libelant to pay whatever the court should decree in his favor out of the deposit. The Association having possession, and the right to operate the boat for its own purposes, was competent to waive immunity and submit to the jurisdiction of this court regardless of whether the Uxmal had the status of a public or private vessel. See Royal Italian Government v. National Brass & Copper Tube Co., 2 Cir., 294 F. 23, 27.

Nelson, Master, v. SS MUNWOOD and another case, 1925 A. M. C. 136 (S. D. N. Y.), holds that appearing and cross-examining a witness on the merits in the taking of depositions is a general appearance *notwithstanding a declaration by counsel that in so doing he appeared specially.* The court said (page 137):

> "Counsel for the owner of the Northern No. 30, however, appeared and cross-examined witnesses on the merits on the taking of depositions entitled in both causes, and also cross-examined Captain Nelson, on the merits on the taking of depositions noticed and entitled only in the cause of the Savannah Sugar Refining Corporation vs. The Munwood and Northern Transportation Company, Inc., always declaring that in doing so he appeared specially for such purpose and no other.
>
> "It, however, has been held that a general appearance is made by taking depositions to be used on the trial of a cause on the merits or by examining or

cross-examining witnesses on the merits. See 4 C. J. 1318, 1334.

"It has also been held that if the appearance is in effect general the fact that a party styles it a special appearance will not change its character and that an appearance for any purpose other than questioning the jurisdiction of the court is general and not special although accompanied by the claim that the appearance is only special, and that a defendant appearing specially must as a general rule keep out of the court for all other purposes. See 4 C. J. 1318."

Ervin v. Quintanilla, 99 F. (2d) 935 (C. C. A. 5th, 1938). We have already quoted from this case on other points. The court specifically recognized the principle that sovereign immunity may be waived by actions of respondent amounting to a general appearance.

The principal action of respondent there complained of was a "suggestion" filed by the Mexican Consul that depositions be not taken pending the determination of representations made to the State Department that the United States, through the Attorney General, should plead sovereign immuniy on behalf of the Mexican government. The court held that this did not amount to a general appearance, and said, page 939:

"The first appearance, to advise the court of the pendency of diplomatic representations, and to suggest that, pending same, depositions be not taken in the cause, was not a general appearance; indeed, it was within the authorities, perhaps not effective as an appearance at all. C/f Ex parte Muir, 254 U. S. 522; 41 S. Ct. 185, 65 L. Ed. 383; The Pesaro, 255 U. S. 216, 41 S. Ct. 308, 65 L. Ed. 592; Compania Espanola

De Navegacion, Maritima, S. A. v. The Navemar, 303 U. S. 68, 58 S. Ct. 432, 82 L. Ed. 677. It was more in the nature of a suggestion amicus curiae which the District Court was at complete liberty to and which it did disregard. Nothing in this suggestion was or could be taken as an invocation of, or a submission to, the jurisdiction of the court. All that it amounted to was an informal suggestion that, pending the diplomatic representations, the matter should proceed no further in the court."

This is an entirely different proposition from the actions taken in the *UCAYALI* case by the Republic of Peru.

We also cite the following cases:

Veitia v. Fortuna Estates, 240 Fed. 256, (C. C. A. 1, 1917).

United States v. New York & O. S. S. Co., Ltd., 216 Fed. 61 (C. C. A. 2, 1914); certiorari granted, 59 L. Ed. 1491, and dismissed on motion of Solicitor General, 59 L. Ed. 1504.

The Bee, Fed. Case No. 1219, 3 Fed. Cases 41 (D. C. Maine, 1836).

In *Sterling Tire Corporation v. Sullivan,* 279 Fed. 336 (C. C. A. 9th, 1922), an appearance by counsel to ask for a continuance was held to be a general appearance.

In *Everett Railway, L. & P. Co. v. United States,* 236 Fed. 806 (D. C. Wash., 1916), the United States, after a bill had been filed, on oral motion, obtained an order extending its time "in which to file herein its appearance, motion or answer". The court said, page 808:

"I think this case must be determined upon the fact as to whether the appearing in court by the de-

fendant and obtaining the order of enlargement of time to answer was the doing of an act in the progress of the cause, and therefore a general appearance and submission to the jurisdiction of the court. Appearance means the coming into court as a party in a proceeding and asking relief in the progress of the cause. Thompson v. Michigan Mutual Ben. Ass'n, 52 Mich. 522, 18 N. W. 247. A party may appear in person or by his agent. Wagner v. Kellogg, 92 Mich. 616, 52 N. W. 1017. And if he does any act or asks any relief from which it may be presumed that he acknowledged the court's jurisdiction, his act is an appearance. Barbour v. Newkirk, 83 Ky. 529, 532. Obtaining an extension of time to plead, answer, demur, or to take such other action as it may be advised is equivalent to a general appearance." (Citing cases.)

In *Clark v. Southern Pacific Co.*, 175 Fed. 122 (W. D. Texas, 1909) the court held that the propounding of interrogatories and obtaining a commission to take testimony was a general appearance.

In *Murphy v. Herring, Hall, Marvin Safe Co.*, 184 Fed. 495, it was held that where the defendant's attorneys applied for and were granted an order extending the time to answer, appear, move, or otherwise plead to the complaint, such action constituted a general appearance. The court pointed out, in determining what a general appearance was, "the effect is not to be deduced from what the party may have intended, but from what he did. It is the act which speaks and not the secret purpose".

To the same effect see:

Zobel v. Zobel, 90 Pac. 171;
Briggs v. Stroud, 58 Fed. 717, (E. D. Wisc., 1893);
Hupfeld v. Automaton, 66 Fed. 788 at 789, (S. D. N. Y., 1895);
Feldman Inv. Co., v. Connecticut Life Ins. Co., 78 Fed. (2) 838, at 840, (C. C. A. 10th, 1935);
Hammond v. District Court, etc., 288 Pac. 758, 761, 30 N. M. 130, 39 A. L. R. 1490.

Petitioner cites and quotes from the case of *Meisukas v. Greenough Red Ash Coal Co.*, 244 U. S. 54, in support of the proposition that an agreed postponement does not convert a special into a general appearance. That case is not in point. There the defendant, appearing specially, objected to the jurisdiction of the court over the defendant and moved to quash the attempted service of process. At the hour fixed for the hearing on this motion it was continued at the request of the *plaintiff*. This court found that this did not constitute a general appearance.

Petitioners refer to *Republic of Bolivia Explor. Syn.* (1914), 1 Ch. 139, and *The JASSY*, (1906), P. 270, 10 Asp. M. C. 278, as declaring the law of England to be that even a general appearance asking time to file evidence, filing evidence on the merits, and raising no question of privilege do not constitute a waiver of sovereign immunity. These authorities do not support this proposition. The *Republic of Bolivia* case involved a suit against a diplomatic agent accredited to the Crown of England, the Second Secretary of the Peruvian Legation. The case deals exclusively with *diplomatic* representatives. The court held that in England both under the common law and under the statute all

writs against foreign public ministers accredited to the Crown are absolutely null and void, and that further it was not satisfied that a subordinate secretary could waive his diplomatic privilege of immunity to suit without the sanction of his sovereign or legation.

In The JASSY a public vessel of the Roumanian government was seized and released on bail, an appearance being made in the case by solicitors. Sovereign immunity was held not waived thereby, because the action was taken without the knowledge or authority of the Roumanian government.

In the United States it is now settled that sovereign immunity will be waived by a general appearance or by acts or conduct inconsistent with the claim of a special appearance. *Porto Rico v. Ramos, supra; Ervin v. Quintanilla, supra;* and other cases cited under Point I.

JURISDICTION.

Petitioner attempts to invoke the jurisdiction of this court under 28 U. S. C. 342 (Judicial Code, Sec. 234) on the ground that the want of jurisdiction of the District Court over the Republic of Peru and the SS UCAYALI is so evident that a writ of prohibition should issue. From what we have said in this brief it is plain that this is a wholly unfounded and unwarranted assertion. Even in cases in which the jurisdiction of the District Court is doubtful, this court has generally exercised its discretion in favor of dismissing the petition for a writ of prohibition.

In Re Muir, 254 U. S. 522.
In Re Chicago, Rock Island & Pacific Ry. Co., 255 U. S. 273.

In the *Muir* case, *supra*, this court said (page 534):

"The power of this court, under sec. 234 of the Judicial Code, to issue writs of prohibition to the district courts, when proceeding as courts of admiralty, to prevent an unlawful assumption or exercise of jurisdiction, is not debatable. But this power, like others, is to be exerted in accordance with principles which are well settled. In some instances, as where the absence of jurisdiction is plain, the writ goes as a matter of right. Ex parte Phenix Ins. Co. 118 U. S. 610, 626, 30 L. Ed. 274, 280, 7 Sup. Ct. Rep. 215; Ex parte Indiana Transp. Co. 244 U. S. 456, 61 L. Ed. 1253, 37 Sup. Ct. Rep. 717. In others, as where the existence or absence of jurisdiction is in doubt, the granting or refusal of the writ is discretionary. Re Cooper, 143 U. S. 472, 485, 36 L. Ed. 232, 12 Sup. Ct. Rep. 453; Re New York & P. R. S. S. Co. 155 U. S. 523, 531, 39 L. Ed. 246, 249, 15 Sup. Ct. Rep. 183; Re Alix, 166 U. S. 136, 41 L. Ed. 948, 17 Sup. Ct. Rep. 522. And see Ex parte Gordon, 104 U. S. 515, 518, 519, 26 L. Ed. 814, 815; The Charkieh, L. R. 8 Q. B. 197, 42 L. J. Q. B. N. S. 75, 28 L. T. N. S. 190, 21 Week. Rep. 437.

"Here the most that can be said against the District Court's jurisdiction is that it is in doubt; and in other respects the situation is such that we deem it a proper exercise of discretion to refuse the writ. Nothing need be added to show that the request for a writ of mandamus is on no better footing. Re Morrison 147 U. S. 14, 26, 27, 37 L. Ed. 60, 65, 13 Sup. Ct. Rep. 246; Re Oklahoma, 220 U. S. 191, 209, 55 L. Ed. 431, 435, 31 Sup. Ct. Rep. 426; Ex parte Roe, 234 U. S. 70, 58 L. Ed. 1217, 34 Sup. Ct. Rep. 722.

"Rule discharged and petition dismissed."

In *In Re Chicago, Rock Island & Pacific Ry. Co., supra,* this court reaffirmed the principles laid down in the Muir decision and dismissed the petition for writs. Is said (page 279):

> "The most that can be said against the district court's jurisdiction is that it is in doubt. And the return recites that the order which declared that the Rock Island became a party rests upon evidence which has not been embodied in the record. The immunity of the Rock Island from suit in the northern district of Ohio, conferred by sec. 51 of the Judicial Code, could be waived (Re Moore, 209 U. S. 490, 52 L. Ed. 901, 28 Sup. Ct. Rep. 585, 706, 14 Ann. Cas. 1164); and ordinarily a general appearance operates as a waiver (Gracie v. Palmer, 8 Wheat. 699, 5 L. Ed. 719). The district court obviously had jurisdiction to determine, in the first instance, whether the Rock Island had entered a general appearance. Jones v. Andrews, 10 Wall. 327, 19 L. Ed. 935."

The correctness of the decision of the district judge in determining that the actions of the Republic of Peru constituted a general appearance and a waiver of the plea of sovereign immunity is so clear that it appears to us that this court should exercise its discretion in favor of dismissing the petition. The most that can be said is that the jurisdiction of this court to entertain this proceeding is discretionary. If, because a friendly foreign sovereign is involved and it is thought desirable that the issue of waiver be finally determined now, this court is inclined to exercise its discretion in favor of considering the merits of the petition, we shall interpose no objection.

It would appear from *Muir v. Chatfield*, (C. C. A. 2) 225 Fed. 24, that this application for writs if made to the United States Circuit Court of Appeals would have been refused.

CONCLUSION.

It appears to be the contention of the petitioner in its brief that because the claim of immunity of the SS UCAYALI has been recognized and allowed by the State Department and because appropriate suggestions were made by the Department of Justice to the District Court, that that court should have regarded the matter as having been settled by the Executive Department and should have disregarded any plea of waiver based on the Republic of Peru's actions in court. This confuses the executive and judicial functions. When the Executive Department recognizes and allows a claim of sovereign immunity and appropriate representations are then made by the Executive Department, to the court, it appears that the court must accept those representations on that issue as conclusive; but the question whether the sovereign prior to the filing of the plea of sovereign immunity has by his actions in court made a general appearance is one for judicial determination. As was said by the commissioner and approved by the court in *The MANGALIA supra*, "The suggestion of immunity herein has no bearing on the question of waiver, which is a matter for judicial determination." The court and the court alone has the right and duty to determine whether the Republic of Peru by invoking the power of the court has made a general ap-

pearance and has thus waived its sovereign immunity. *In Re Chicago, Rock Island & Pac. Ry. Co., supra.* The Republic of Peru, notwithstanding the good neighbor policy, is not entitled to receive in courts of the United States any rights or privileges beyond those which would be accorded to any friendly sovereign. If, like the government of Porto Rico in *Porto Rico v. Ramos, supra,* or the Republic of Portugal in the *SAO VICENTE* cases, *supra,* or the Kingdom of Roumania (then not an enemy), in the *MANGALIA* case, *supra,* or the Republic of Mexico in the *UXMAL* case, *supra,* the Republic of Peru in this case has by its actions made a general appearance, it must bear the legal consequences. The good neighbor policy has no place in this litigation.

In a case of this character it must be kept in mind that a contention that a vessel is immune from jurisdiction amounts to an assertion of an exception to the general rule, which is that when a merchant vessel of a foreign nation enters our waters, she submits herself to the jurisdiction of our courts. When libelant filed its libel against the UCAYALI, it was asserting a well established property right against that vessel and should not be deprived of that right except on the clearest proof that the vessel and her claimant are entitled to sovereign immunity, and that the plea of sovereign immunity has not been waived. Any doubts should be resolved against the vessel. As was said in *In Re Muir,* 254 U. S. 522, "*prima facie* the District Court had jurisdiction of the suit and the vessel, and to call that jurisdiction in question was to assume the burden of showing what was in the way of its existence or exertion". The UCAYALI had contracted to carry

libelant's cargo of sugar to New York. Because of fears of submarines on the Atlantic Coast, the master, officers, and crew of the UCAYALI refused to go to New York. The vessel then proceeded to New Orleans. By the delivery of the sugar at New Orleans libelant alleges that it has sustained damages in excess of $60,000.00. If a plea of sovereign immunity is maintained and is held not waived, libelant will be without remedy for its wrongs.

The decision of the District Judge was right. The rule should be discharged and the petition for a writ of prohibition and/or mandamus should be dismissed.

Respectfully submitted,

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February 18, 1943.

pp. 4+6 - Frankfurter J. opinion.

SUPREME COURT OF THE UNITED STATES.

No. 13, Original.—OCTOBER TERM, 1942.

Ex parte Republic of Peru, owner of the Peruvian Steamship "Ucayali".

On Motion for Leave to File Petition for a Writ of Prohibition and/or a Writ of Mandamus.

[April 5, 1943.]

Mr. Chief Justice STONE delivered the opinion of the Court.

This is a motion for leave to file in this Court the petition of the Republic of Peru for a writ of prohibition or of mandamus. The petition asks this Court to prohibit respondent, a judge of the District Court for the Eastern District of Louisiana, and the other judges and officers of that court, from further exercise of jurisdiction over a proceeding *in rem*, pending in that court against petitioner's steamship *Ucayali*, and to direct the district judge to enter an order in the proceeding declaring the vessel immune from suit. The questions for decision here are whether this Court has jurisdiction to issue the writ, whether such jurisdiction should in our discretion be exercised in petitioner's behalf, and whether petitioner's appearance and defense of the suit in the district court was, as that court has ruled, a waiver of its claim that the vessel, being that of a friendly sovereign state, is immune from suit brought by a private party in the court of the United States.

On March 30, 1942, Galban Lobo Co., S. A., a Cuban corporation, filed a libel in the district court against the *Ucayali* for its failure to carry a cargo of sugar from a Peruvian port to New York, as required by the terms of a charter party entered into by libelant with a Peruvian corporation acting as agent in behalf of the Peruvian Government. On April 9, 1942, the Republic of Peru, acting by the master of the vessel, intervened in the district court by filing a claim to the vessel, averring that the Republic of Peru was sole owner, and stating: "The filing of this claim is not a general appearance and is without prejudice to or waiver of all defenses and objections which may be available to respondent and claimant, particularly, but not exclusively, sovereign immunity".

On the same day petitioner procured the release of the vessel by filing a surety release bond in the sum of $60,000, on which petitioner was principal. The bond, which contained a reservation identical with that appearing in petitioner's claim to the vessel, was conditioned upon payment of any amount awarded to libelant by the final decree in the cause. On April 11th petitioner proceeded in the cause to take the testimony of the master on the merits, and spread on the record a statement that the testimony was taken with like "full reservation and without waiver of all defenses and objections which may be available to respondent claimant, particularly, but not exclusively, sovereign immunity". Petitioner also stated that "the appearance of counsel for the Government of Peru and the Steamship *Ucayali* is for the special purpose only of taking the testimony of the master under the reservation aforesaid".

On April 18th, and again on May 10th and on May 29th, petitioner moved for and obtained an order of the district court extending its time within which to answer or otherwise plead to the libel. Each motion was made "with full reservation and without waiver of any defenses and objections which may be available to mover, particularly, but not exclusively, sovereign immunity".

In the meantime petitioner, following the accepted course of procedure (see *Ex parte Muir*, 254 U. S. 522; *The Navemar*, 303 U. S. 68), by appropriate representations, sought recognition by the State Department of petitioner's claim of immunity, and asked that the Department advise the Attorney General of the claim of immunity and that the Attorney General instruct the United States Attorney for the Eastern District of Louisiana to file in the district court the appropriate suggestion of immunity of the vessel from suit. These negotiations resulted in formal recognition by the State Department of the claim of immunity. This was communicated to the Attorney General by the Under Secretary's letter of May 5, 1942. The letter requested him to instruct the United States Attorney to present to the district court a copy of the Ambassador's formal claim of immunity filed with the State Department, and to say that "this Department accepts as true the statements of the Ambassador concerning the steamship *Ucayali*, and recognizes and allows the claim of immunity".

Pursuant to these instructions the United States Attorney, on June 29th, filed in the district court a formal statement advising the court of the proceedings and communications mentioned, suggesting to the court and praying "that the claim of immunity made

on behalf of the said Peruvian Steamship *Ucayali* and recognized and allowed by the State Department be given full force and effect by this court"; and "that the said vessel proceeded against herein be declared immune from the jurisdiction and process of this court". On July 1st petitioner moved for release of the vessel and that the suit be dismissed. The district court denied the motion on the ground that petitioner had waived its immunity by applying for extensions of time within which to answer, and by taking the deposition of the master—steps which the district court thought constituted a general appearance despite petitioner's attempted reservation of its right to assert its immunity as a defense in the suit. — F. Supp. —.

The first question for our consideration is that of our jurisdiction. Section 13 of the Judiciary Act of 1789, 1 Stat. 81, conferred upon this Court "power to issue writs of prohibition to the district courts, when proceeding as courts of admiralty and maritime jurisdiction, and writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States". And § 14 provided that this Court and other federal courts "shall have power to issue writs of scire facias, habeas corpus, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law". 1 Stat. 81. These provisions have in substance been carried over into §§ 234 and 262 of the Judicial Code (28 U. S. C. §§ 342, 377), and § 751 of the Revised Statutes (28 U. S. C. § 451).

The jurisdiction of this Court as defined in Article III, § 2, of the Constitution is either "original" or "appellate". Suits brought in the district courts of the United States, not of such character as to be within the original jurisdiction of this Court under the Constitution, are cognizable by it only in the exercise of its appellate jurisdiction. Hence its statutory authority to issue writs of prohibition or mandamus to district courts can be constitutionally exercised only insofar as such writs are in aid of its appellate jurisdiction. *Marbury* v. *Madison,* 1 Cranch 137, 173-80; *Ex parte Siebold,* 100 U. S. 371, 374-75.

Under the statutory provisions, the jurisdiction of this Court to issue common law writs in aid of its appellate jurisdiction has been consistently sustained. The historic use of writs of prohibition and mandamus directed by an appellate to an inferior court has been to exert the revisory appellate power over the inferior

court. The writs thus afford an expeditious and effective means of confining the inferior court to a lawful exercise of its prescribed jurisdiction, or of compelling it to exercise its authority when it is its duty to do so. Such has been the office of the writs when directed by this Court to district courts, both before the Judiciary Act of 1925, 43 Stat. 936,[1] and since.[2] In all these cases (cited in notes 1 and 2), the appellate, not the original, jurisdiction of this Court was invoked and exercised.[3]

The common law writs, like equitable remedies, may be granted or withheld in the sound discretion of the Court, *Ex parte Skinner & Eddy Corp.*, 265 U. S. 86, 95-96; *Ex parte City of Monterey*, 269 U. S. 527; *Maryland* v. *Soper* (*No. 1*), 270 U. S. 9, 29; *United States* v. *Dern*, 289 U. S. 352, 359, and are usually denied where other adequate remedy is available. *Ex parte Baldwin*, 291 U. S. 610. And ever since the statute vested in the circuit courts of appeals appellate jurisdiction on direct appeal from the district courts, this Court, in the exercise of its discretion, has in appropriate circumstances declined to issue the writ to a district court, but without prejudice to an application to the circuit court of appeals (*Ex parte Apex Mfg. Co.*, 274 U. S. 725; *Ex parte Daugh-*

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[1] E. g., Ex parte State of New York, No. 1, 256 U. S. 490; The Western Maid, 257 U. S. 419; Ex parte Simons, 247 U. S. 231; Ex parte Peterson, 253 U. S. 300, 305; Ex parte Hudgings, 249 U. S. 378; Ex parte Uppercu, 239 U. S. 435; Matter of Heff, 197 U. S. 488; Ex parte Siebold, 100 U. S. 371; Ex parte Watkins, 3 Pet. 193; United States *v.* Peters, 3 Dall. 121.

[2] Ex parte United States, 287 U. S. 241; Maryland *v.* Soper (No. 1), 270 U. S. 9, 27-28; Maryland *v.* Soper (No. 2), 270 U. S. 36; Maryland *v.* Soper (No. 3), 270 U. S. 44; Colorado *v.* Symes, 286 U. S. 510; McCullough *v.* Cosgrave, 309 U. S. 634; Ex parte Kawato, 317 U. S. 69; see Los Angeles Brush Corp. *v.* James, 272 U. S. 701.

[3] See particularly the discussion in Maryland *v.* Soper (No. 1), 270 U. S. 9, 28-30, and in Ex parte United States, 287 U. S. 241. Compare Ex parte Siebold, 100 U. S. 371.

Ex parte United States, *supra*, was not and could not have been a case of original jurisdiction. The Constitution confers original jurisdiction only in cases affecting ambassadors, other public ministers and consuls, and "those in which a State shall be Party" (Art. III, § 2, cl. 2). No state was made a party to Ex parte United States. The United States has never been held to be a "State" within this provision—and it obviously is not—nor has it any standing to bring an original action in this Court which does not otherwise come within one of the provisions of Article III, § 2, cl. 2. United States *v.* Texas, 143 U. S. 621, relied upon to sustain a different view, was within the original jurisdiction because the state of Texas was the party defendant. And until now it has never been suggested that necessity, however great, warrants the exercise by this Court of original jurisdiction which the Constitution has not conferred upon it. Moreover, even if Congress had withdrawn this Court's appellate jurisdiction by the 1925 Act, there would have been no necessity in Ex parte United States for inventing an original jurisdiction which the Constitution had withheld, since a writ of mandamus could have been applied for in the circuit court of appeals.

erty, 282 U. S. 809; *Ex parte Krentler-Arnold Hinge Last Co.*, 286 U. S. 533), which likewise has power under § 262 of the Judicial Code to issue the writ. *McClellan* v. *Carland*, 217 U. S. 268; *Adams* v. *U. S. ex rel. McCann*, 317 U. S. 269.

After a full review of the traditional use of the common law writs by this Court, and in issuing a writ of mandamus, in aid of its appellate jurisdiction, to compel a district judge to issue a bench warrant in conformity to statutory requirements, this Court declared in *Ex parte United States*, 287 U. S. 241, 248-49: "The rule deducible from the later decisions, and which we now affirm, is, that this Court has full power in its discretion to issue the writ of mandamus to a federal district court, although the case be one in respect of which direct appellate jurisdiction is vested in the circuit court of appeals—this Court having ultimate discretionary jurisdiction by certiorari—but that such power will be exercised only where a question of public importance is involved, or where the question is of such a nature that it is peculiarly appropriate that such action by this Court should be taken. In other words, application for the writ ordinarily must be made to the intermediate appellate court, and made to this Court as the court of ultimate review only in such exceptional cases."[4]

We conclude that we have jurisdiction to issue the writ as prayed. And we think that—unless the sovereign immunity has been waived—the case is one of such public importance and exceptional character as to call for the exercise of our discretion to issue the writ rather than to relegate the Republic of Peru to the circuit court of appeals, from which it might be necessary to bring

[4] The suggestion that the Judiciary Act of 1925 was intended to curtail the jurisdiction previously exercised by this Court in granting such writs to the district courts finds no support in the history or language of the Act. The Act was originally prepared by a committee of justices of this Court, by whom it was submitted to Congress for consideration. Four members of this Court gave testimony before Congressional committees in explanation of the purposes and meaning of the Act, and Chief Justice Taft submitted a detailed statement of the changes which the Act would effect. These disclose that the great purpose of the Act was to curtail the Court's obligatory jurisdiction by substituting, for the appeal as of right, discretionary review by certiorari in many classes of cases. In all the oral and written submissions by members of this Court, and in the reports of the committees of Congress which recommended adoption of the bill, there is not a single suggestion that the Act would withdraw or limit the Court's existing jurisdiction to direct the common law writs to the district courts when, in the exercise of its discretion, it deemed such a remedy appropriate. [See Résumé, together with Citations Affecting Sections of Senate Bill 3164, submitted by Chief Justice Taft, printed for use of Senate Committee on the Judiciary, 67th Cong., 2d Sess.; Hearing on S. 2060 and S. 2061, before a Subcommittee of the Senate Committee on the Judiciary, Feb. 2, 1924, 68th Cong., 1st Sess.; Hearing on H. R. 8206 before House Committee on the Judiciary, Dec. 18, 1924, 68th Cong., 2d Sess.; S. Rep. No.

the case to this Court again by certiorari. The case involves the dignity and rights of a friendly sovereign state, claims against which are normally presented and settled in the course of the conduct of foreign affairs by the President and by the Department of State. When the Secretary elects, as he may and as he appears to have done in this case, to settle claims against the vessel by diplomatic negotiations between the two countries rather than by continued litigation in the courts, it is of public importance that the action of the political arm of the Government taken within its appropriate sphere be promptly recognized, and that the delay and inconvenience of a prolonged litigation be avoided by prompt termination of the proceedings in the district court. If the Republic of Peru has not waived its immunity, we think that there are persuasive grounds for exercising our jurisdiction to issue the writ in this case and at this time without requiring petitioner to apply to the circuit court of appeals, and that those grounds are at least as strong and urgent as those found sufficient in *Ex parte United States*, in *Maryland* v. *Soper*, in *Colorado* v. *Symes*, and in *McCul-*

362, 68th Cong., 1st Sess.; H. Rep. No. 1075, 68th Cong., 2d Sess.] The changes in existing law proposed to be made by the Act were set forth with painstaking detail. It is hardly conceivable that the justices of this Court, fully familiar with its practice, would have left unexpressed an intention—had such intention really existed—to curtail drastically a jurisdiction which the Court had exercised under statutory authority from the beginning of its history. Ex parte United States, and most of the other cases cited in note 2, *supra*, were decided at a time when members of the Court's committee responsible for the 1925 Act were still members of the Court. The Court's unanimous concurrence in the existence of its jurisdiction in the cases subsequent to the 1925 Act establishes a practice (cf. Stuart *v.* Laird, 1 Cranch 299, 309) which would be beyond explanation if there had been any thought that any provision of the Act had placed such a restriction on the Court's jurisdiction to issue the writs.

Nor can it be said that this legislative history gives any support to the suggestion that the failure of the 1925 Act to cut off the jurisdiction of this Court to issue the common law writs to district courts was inadvertent, and that the Act should therefore be construed as though it had done what it failed to do. The jurisdiction of this Court to issue such writs, like its jurisdiction to grant certiorari, is discretionary. The definite aim of the 1925 Act was to enlarge, not to destroy, the Court's discretionary jurisdiction. That aim can hardly give rise to an inference of an unexpressed purpose to amend or repeal the statutes of the United States conferring jurisdiction on the Court to issue the writs, or an inference that such would have been the purpose had repeal been proposed. The exercise of that jurisdiction has placed no undue burden on this Court. It is significant that, since 1925, less than ten of the numerous applications to this Court for such writs have been granted. Only in rare instances has their denial been the occasion for an opinion dealing with questions of public importance. See, e. g., Los Angeles Brush Corp. *v.* James, 272 U. S. 701; Ex parte Baldwin, 291 U. S. 610; Ex parte Colonna, 314 U. S. 510; cf. Mooney *v.* Holohan, 294 U. S. 103. And whatever the scope of the jurisdiction of this Court, in no case does it decline to examine an application in order to determine whether it has jurisdiction.

lough v. *Cosgrave*, all *supra*, note 2. We accordingly pass to the question whether petitioner has waived his immunity.

This case presents no question of the jurisdiction of the district court over the person of a defendant. Such jurisdiction must be acquired either by the service of process or by the defendant's appearance or participation in the litigation. Here the district court acquired jurisdiction *in rem* by the seizure and control of the vessel, and the libelant's claim against the vessel constituted a case or controversy which the court had authority to decide. Indeed, for the purpose of determining whether petitioner was entitled to the claimed immunity, the district court, in the absence of recognition of the immunity by the Department of State, had authority to decide for itself whether all the requisites for such immunity existed—whether the vessel when seized was petitioner's, and was of a character entitling it to the immunity. See *Ex parte Muir, supra; The Pesaro*, 255 U. S. 216; *Berizzi Bros. Co.* v. *S. S. Pesaro*, 271 U. S. 562; *The Navemar, supra*. Therefore the question which we must decide is not whether there was jurisdiction in the district court, acquired by the appearance of petitioner, but whether the jurisdiction which the court had already acquired by seizure of the vessel should have been relinquished in conformity to an overriding principle of substantive law.

That principle is that courts may not so exercise their jurisdiction, by the seizure and detention of the property of a friendly sovereign, as to embarrass the executive arm of the government in conducting foreign relations. "In such cases the judicial department of this government follows the action of the political branch, and will not embarrass the latter by assuming an antagonistic jurisdiction". *United States* v. *Lee*, 106 U. S. 196, 209. More specifically, the judicial seizure of the vessel of a friendly foreign state is so serious a challenge to its dignity, and may so affect our friendly relations with it, that courts are required to accept and follow the executive determination that the vessel is immune. When such a seizure occurs the friendly foreign sovereign may present its claim of immunity by appearance in the suit and by way of defense to the libel. *The Navemar, supra*, 74 and cases cited; *Ex parte Muir, supra*. But it may also present its claim to the Department of State, the political arm of the Government charged with the conduct of our foreign affairs. Upon recognition and allowance of the claim by the State Department and certification of its action presented to the court by the Attorney General, it is the court's duty to surrender the vessel

and remit the libelant to the relief obtainable through diplomatic negotiations. *The Navemar, supra,* 74; *The Exchange,* 7. Cranch 116. This practice is founded upon the policy, recognized both by the Department of State and the courts, that our national interest will be better served in such cases if the wrongs to suitors, involving our relations with a friendly foreign power, are righted through diplomatic negotiations rather than by the compulsions of judicial proceedings.

We cannot say that the Republic of Peru has waived its immunity. It has consistently declared its reliance on the immunity, both before the Department and in the district court. Neither method of asserting the immunity is incompatible with the other. Nor, in view of the purpose to be achieved by permitting the immunity to be asserted, are we able to perceive any ground for saying that the district court should disregard the claim of immunity, which a friendly sovereign is authorized to advance by way of defense in the pending suit, merely because the sovereign has seen fit to preserve its right to interpose other defenses. The evil consequences which might follow the seizure of the vessel are not any the less because the friendly state asserts other grounds for the vessel's release.

Here the State Department has not left the Republic of Peru to intervene in the litigation through its Ambassador as in the case of *The Navemar.* The Department has allowed the claim of immunity and caused its action to be certified to the district court through the appropriate channels. The certification and the request that the vessel be declared immune must be accepted by the courts as a conclusive determination by the political arm of the Government that the continued retention of the vessel interferes with the proper conduct of our foreign relations. Upon the submission of this certification to the district court, it became the court's duty, in conformity to established principles, to release the vessel and to proceed no further in the cause. We have no occasion to decide whether the court should surrender the vessel and dismiss the suit on certification of sovereign immunity by the Secretary, made after the friendly sovereign has once unqualifiedly assented to a judicial determination of the controversy.

The motion for leave to file is granted. We assume that, in view of this opinion, formal issuance of the writ will be unnecessary, and we direct that the writ issue only on further application by the petitioner.

Mr. Justice ROBERTS concurs in the result.

SUPREME COURT OF THE UNITED STATES.

No. —, Original.—October Term, 1942.

Ex parte Republic of Peru, owner of the Peruvian Steamship "Ucayali".

On Motion for Leave to File Petition for a Writ of Prohibition and/or a Writ of Mandamus.

[April 5, 1943.]

Mr. Justice Frankfurter, dissenting.

If due regard be had for its aims, the Judiciary Act of 1925, 43 Stat. 936, denies us, in my opinion, the power to review the action in this case of the District Court for the Eastern District of Louisiana, even though such review is cast in form of a writ of prohibition or of mandamus. But, even assuming we have discretionary power to issue such writs to a district court, we should in the circumstances of this case abstain from exercising that power in view of the absence of any showing that relief equally prompt and effective and consonant with the national interest was not, and is not, available in the appropriate Circuit Court of Appeals.

The range of cases that may be brought here directly from the district courts and the rigor with which we limit our discretionary jurisdiction determine the capacity of this Court adequately to discharge its essential functions. I shall therefore briefly state the grounds for believing that this case is improperly here, that the rule should be discharged, and the motion for leave to file the petition be denied. I put to one side the relation of the Peruvian Ambassador to this litigation. This is not a proceeding falling under the rubric "Cases affecting Ambassadors" and thereby giving us original jurisdiction. My brethren do not so treat it, and our common starting point is that in taking hold of this case the Court is exercising its appellate jurisdiction.

We are also agreed that this Court "can exercise no appellate jurisdiction, except in the cases, and in the manner and form, defined and prescribed by Congress". *Amer. Const. Co.* v. *Jack-*

sonville Railway, 148 U. S. 372, 378. Had this case arisen under the Evarts Act (Act of March 3, 1891, 26 Stat. 826), appeal could have been taken from the district court, since its jurisdiction was in issue, directly to this Court without going to the Circuit Court of Appeals. See, *e. g., Wilson* v. *Republic Iron Co.;* 257 U. S. 92. And since the case would have been within the immediate appellate jurisdiction of this Court, §§ 13 and 14 of the first Judiciary Act, 1 Stat. 73, 80-82 (now 28 U. S. C. §§ 342, 377, 451), would have authorized this Court to issue an appropriate writ to prevent frustration of its appellate power, see *Ex parte Crane,* 5 Pet. 190, or have enabled it to accelerate its own undoubted reviewing authority where, under very exceptional circumstances, actual and not undefined interests of justice so required. Compare *In re Chetwood,* 165 U. S. 443; *Whitney* v. *Dick,* 202 U. S. 132; *Adams* v. *U. S. ex rel. McCann,* 317 U. S. 269.

The power to issue these auxiliary writs is not a qualification or even a loose construction of the strict limits, defined by the Constitution and the Congress, within which this Court must move in reviewing decisions of lower courts. There have been occasional, but not many, deviations from the true doctrine in employing these auxiliary writs as incidental to the right granted by Congress to this Court to review litigation, in aid of which it may become necessary to issue a facilitating writ. The issuance of such a writ is, in effect, an anticipatory review of a case that can in due course come here directly. When the Act of 1891 established the intermediate courts of appeals and gave to them a considerable part of the appellate jurisdiction formerly exercised by the Supreme Court, the philosophy and practice of federal appellate jurisdiction came under careful scrutiny. This Court uniformly and without dissent held that it was without power to issue a writ of mandamus in a case in which it did not otherwise have appellate jurisdiction. *In re Massachusetts,* 197 U. S. 482, and *In re Glaser,* 198 U. S. 171. In these cases rules were discharged because, under the Circuit Courts of Appeals Act, appeals could not be brought directly to the Supreme Court but would have to go to the Circuit Court of Appeals, and only thereafter could they come here, if at all, through certiorari. But review could be brought directly to this Court of cases in which the jurisdiction of the district court was in issue, and therefore writs of "prohibition or mandamus or certiorari as ancillary thereto", *In re*

Massachusetts, supra at 488, were available. Cases which came here directly, prior to the Judiciary Act of February 13, 1925, 43 Stat. 936, to review the jurisdiction of the district courts, whether on appeal or through the informal procedure of auxiliary writs, are therefore not relevant precedents for the present case.

The Judiciary Act of 1925 was aimed to extend the Court's control over its business by curtailing its appellate jurisdiction drastically. Relief was given by Congress to enable this Court to discharge its indispensable functions of interpreting the Constitution and preserving uniformity of decision among the eleven intermediate courts of appeals. Periodically since the Civil War—to speak only of recent times—the prodigal scope of the appellate jurisdiction of this Court brought more cases here than even the most competent tribunal could wisely and promptly adjudicate. Arrears became inevitable until, after a long legislative travail, the establishment in 1891 of intermediate appellate tribunals freed this Court of a large volume of business. By 1916 Congress had to erect a further dam against access to this Court of litigation that already had been through two lower courts and was not of a nature calling for the judgment of the Supreme Court. Act of September 6, 1916, 39 Stat. 726. But the increase of business—the inevitable aftermath of the Great War and of renewed legislative activity—soon caught up with the meager relief afforded by the Act of 1916. The old evils of an overburdened docket reappeared. Absorption of the appellate jurisdiction of the Supreme Court by cases that should have gone to, or been left with, the circuit courts of appeals resulted in unjustifiable subordination of the national interests in the special keeping of this Court. To be sure, the situation was not as bad as that which called the circuit courts of appeals into being. In the eighties three to four years elapsed between the docketing and the hearing of a case. But it was bad enough. In 1922 Chief Justice Taft reported to Congress that it took from fifteen to eighteen months for a case to reach argument.

The needless clog on the Court's proper business came from two sources. More than a dozen classes of cases could have a second review in the Supreme Court, as a matter of right, after an unsuccessful appeal in the circuit courts of appeals. With a single exception all adjudications by the circuit courts of appeals were by the Act of 1925 made reviewable only by the discretionary writ of certiorari. But no less prolific a source of mischief in the

practical application of the appellate jurisdiction of the Supreme Court prior to the Act of 1925, was the right to bring cases directly to this Court from the district courts. According to the figures submitted to Congress in support of the need for the 1925 legislation, one-sixth of the total business of the Supreme Court came directly from the district courts. (Hearing before a Subcommittee of the Committee on the Judiciary, United States Senate, 68th Cong., 1st Sess., on S. 2060 and S. 2061, pp. 32-33, 44-45.) Most of these cases presented phases of the general question now before us, namely, the right of a district court to adjudicate. The obvious remedy for this unwarranted direct review of courts of first instance was to shut off direct access from the district courts to this Court. That is exactly what was proposed. In the language of the chief spokesman before the judiciary Committees, "Section 238 as amended and reenacted in the bill would permit cases falling within four particular classes, and those only, to come from the district courts directly to the Supreme Court. . . . Apart from cases within these four classes, the bill provides that the immediate review of all decisions in the district courts shall be in the circuit courts of appeals. We regard this as the better course and calculated to promote the public interest." *Ibid.*, 33-34. This conception of "the public interest" was translated into law, except that in one additional class of cases direct review was allowed from the district courts to this Court. Suffice it to say that the five ~~accepted~~ excepted categories are not in serious derogation of the wise requirement that review of action by the district courts belongs to the circuit courts of appeals. All five either involve litigation before a district court composed of three judges, or ordinarily touch matters of national concern.

The present power of this Court to review directly decisions of district courts must be determined by the restrictions Congress imposed in the Act of 1925. The language of that section is significant:

"A direct review by the Supreme Court of an interlocutory or final judgment or decree of a district court may be had where it is so provided in the following Acts or parts of Acts, *and not otherwise.* . . ." (43 Stat. 936, 938—italics provided.)

This case does not fall even remotely within any of these five Acts.[1] We have thus been given no appellate jurisdiction over this

[1] "SEC. 238. A direct review by the Supreme Court of an interlocutory or final judgment or decree of a district court may be had where it is so provided in the following Acts or parts of Acts, and not otherwise:

controversy, but by resort to so-called ancillary writs we are exercising appellate jurisdiction here. On principle, it is still as true as it was held to be in *In re Massachusetts, supra,* and *In re Glaser, supra,* that "in cases over which we possess neither original nor appellate jurisdiction we cannot grant prohibition or mandamus . . . as ancillary thereto". 197 U. S. 482, 488. This does not imply that by indirection the Act of 1925 repealed what were originally §§ 13 and 14 of the Judiciary Act of 1789, on which, in their present form in the United States Code (28 U. S. C. §§ 342, 377, 451), the Court relies. The new distribution of appellate jurisdiction between the Supreme Court and the circuit courts of appeals did not repeal these old provisions. It does, however, call for restriction of their application in harmony with this new distribution. Ancillary writs are still available both for the circuit courts of appeals and this Court when they may in fact be ancillary to a main suit. See *Ex parte Kawato,* 316 U. S. 650, 317 U. S. 69, 71 (leave to file petition for writ of mandamus granted after such leave was denied by the Circuit Court of Appeals); and *Adams* v. *U. S. ex rel. McCann,* 317 U. S. 269. But when we cannot have jurisdiction in a case on appeal, no proceeding can be ancillary to it.

I am not unmindful that the hearings on the Judiciary Act of 1925 before the Committees of Congress are completely silent regarding the appellate jurisdiction of this Court through use of ancillary writs. But it would not be the first time in the history of

(1) Section 2 of the Act of February 11, 1903, 'to expedite the hearing and determination' of certain suits brought by the United States under the antitrust or interstate commerce laws, and so forth.

(2) The Act of March 2, 1907, 'providing for writs of error in certain instances in criminal cases' where the decision of the district court is adverse to the United States.

(3) An Act restricting the issuance of interlocutory injunctions to suspend the enforcement of the statute of a State or of an order made by an administrative board or commission created by and acting under the statute of a State, approved March 4, 1913, which Act is hereby amended by adding at the end thereof, 'The requirement respecting the presence of three judges shall also apply to the final hearing in such suit in the district court; and a direct appeal to the Supreme Court may be taken from a final decree granting or denying a permanent injunction in such suit.'

(4) So much of 'An Act making appropriations to supply urgent deficiencies in appropriations for the fiscal year 1913, and for other purposes,' approved October 22, 1913, as relates to the review of interlocutory and final judgments and decrees in suits to enforce, suspend, or set aside orders of the Interstate Commerce Commission other than for the payment of money.

(5) Section 316 of "An Act to regulate interstate and foreign commerce in livestock, livestock products, dairy products, poultry, poultry products, and eggs, and for other purposes' approved August 15, 1921." 43 Stat. 936, 938.

judiciary legislation that eminent jurisdictional authorities and expert draftsmen, preoccupied with major problems in a large scheme for relieving this Court of undue business, have been forgetful of minor aspects of jurisdiction. For instance, it took six years to deal with the implications overlooked by Senator Evarts in using the phrase "infamous crimes" in the Act of 1891. (See *In re Claasen,* 140 U. S. 200, and H. Rep. No. 666, 54th Cong., 1st Sess., the letter of Chief Justice Fuller to Senator Hoar in 23 Cong. Rec. 3285-86, Report of Attorney General Olney for 1893, xxv, and the Act of January 20, 1897, 29 Stat. 492.) Legislation by even the most competent hands, like other forms of composition, is subject to the frailties of the imagination. Concentration on the basic aims of a reform like the Act of 1925 inevitably overlooks lacunae and ambiguities which the future reveals and which the future must correct. The Act of 1925, despite its deft authorship, soon revealed such ambiguities. See the series of cases collected in *Phillips* v. *United States,* 312 U. S. 246, 250-51. They were resolved by faithful enforcement of the central purpose of the Act of February 13, 1925, which was "to keep within narrow confines our appellate docket", 312 U. S. at 250. For more than half a century the desire of Congress to cut down the appellate jurisdiction of this Court has been given effect in a variety of situations even though Congress did not adequately express such purpose. See, for instance, *McLish* v. *Roff,* 141 U. S. 661; *Robinson* v. *Caldwell,* 165 U. S. 359; *America Sugar Refining Co.* v. *New Orleans,* 181 U. S. 277; *American Security Co.* v. *Dist. of Columbia,* 224 U. S. 491; *Inter-Island Steam Nav. Co.* v. *Ward,* 242 U. S. 1.

Finally, it is urged that practice since the Judicial Act of 1925 sanctions the present assumption of jurisdiction. Cases like *Ex parte Northern Pac. R. Co.,* 280 U. S. 142, ordering a district judge to summon three judges to hear a suit under § 266 of the Judicial Code (28 U. S. C. § 380), must be put to one side. This is one of the excepted classes under the Act of 1925 in which direct review lies from a district court to the Supreme Court, and it is therefore an orthodox utilization of an ancillary writ within the rule of *In re Massachusetts, supra.* Of all the other cases in which, since the Act of 1925, a writ was authorized to be issued, none is comparable to the circumstances of the present case. In one, *Ex parte Kawato, supra,* the appellate jurisdiction of this Court was invoked only after it was denied by a circuit court of appeals. Another, *Ex parte United States,* 287 U. S. 241, while in form a review of action

by a district court, was in fact an independent suit by the United States because no appeal as such lay from the refusal of the district judge in that case to issue a bench warrant in denial of his duty. If the suit was a justiciable controversy through use of the ancillary writ, it was equally justiciable if regarded as an original suit by the United States. While, to be sure, it was not formally such, and while an ordinary suit by the United States to enforce an obligation against one of its citizens properly cannot be brought within the original jurisdiction of this Court, *Ex parte United States, supra,* was quite different. There the United States sought enforcement of a public duty for which no redress could be had in any other court. Therefore, the considerations which led this Court in *United States* v. *Texas,* 143 U. S. 621, to allow the United States to initiate an original suit in this Court, although the merely literal language of the Constitution precluded it (as the dissent in that case insisted), might have been equally potent to allow assumption of such jurisdiction in the circumstances of *Ex parte United States.* But, in any event, merely because there is no other available judicial relief is no reason for taking appellate jurisdiction. For some situations the only appropriate remedy is corrective legislation. Of the same nature were four other cases, three suits by Maryland and one by Colorado. *Maryland* v. *Soper* (1), 270 U. S. 9; *Maryland* v. *Soper* (2), 270 U. S. 36; *Maryland* v. *Soper* (3), 270 U. S. 44; *Colorado* v. *Symes,* 286 U. S. 510. These cases were not ordinary claims by a state against one of its citizens for which the state courts are the appropriate tribunals, see *California* v. *Southern Pacific Co.,* 157 U. S. 229. They were in effect suits by states against federal functionaries in situations in which the citizenship of these functionaries was irrelevant to the controversy. And so the considerations that made the controversies by Maryland and Colorado justiciable through ancillary writs might have been equally relevant in establishing justiciability for original suits in this Court under Article III, Section 2. It is not without significance that the *Maryland* v. *Soper* cases and *Colorado* v. *Symes,* which the Court now regards as precedents for the ruling in *Ex parte United States,* were not even referred to in the opinion in the latter case.

If *Ex parte United States,* the *Maryland* v. *Soper* cases, and *Colorado* v. *Symes, supra,* are not to be supported on the basis of their peculiar circumstances which might have justified the Court in assuming jurisdiction, they should be candidly regarded as

deviations from the narrow limits within which our appellate jurisdiction should move. They would then belong with the occasional lapses which occur when technical questions of jurisdiction are not properly presented to the Court and consciously met. That leaves two other cases, *Los Angeles Brush Corp.* v. *James,* 272 U. S. 701, and *McCullough* v. *Cosgrave,* 309 U. S. 634. In the *Los Angeles Brush* case, the Court explicitly refused to invoke authority to issue an ancilliary writ inasmuch as the appellate jurisdiction of the controversy belonged to the Circuit Court of Appeals and not to this Court. The case concerned "the enforcement of the Equity Rules", 272 U. S. at 706, and the power which this Court recognized in that case was part of the duty imposed upon the Court by Congress to formulate and put in force the Equity Rules. The *McCullough* case was equally restricted. It merely followed the *Los Angeles Brush* case in enforcing the Equity Rules.

To be sure, *Ex parte United States, supra,* stated that later cases had qualified *In re Massachusetts* and *In re Glaser, supra.* But the cases that were avouched (*McClellan* v. *Carland,* 217 U. S. 268; *Ex parte Abdu,* 247 U. S. 27) in no wise called into question *In re Massachusetts* and *In re Glaser,* and the actual decisions left them intact. The authority of *In re Massachusetts, supra,* and *In re Glaser, supra,* was unquestioned as late as 1923, in *Magnum Co.* v. *Coty,* 262 U. S. 159, after, that is, the cases referred to in *Ex parte United States, supra,* as having limited *In re Massachusetts* and *In re Glaser.* The essence of the Act of 1925 was curtailment of our appellate jurisdiction as a measure necessary for the effective discharge of the Court's functions. It is hardly consonant with this restrictive purpose of the Act of 1925 to enlarge the opportunities to come to this Court beyond the limit recognized and enforced under the Act of 1891—that there can be no ancillary jurisdiction where the litigation on the merits could not directly come here for review. In only one of the cases since the Act of 1925 in which the ancillary writs were invoked in situations in which this Court did not have direct appellate jurisdiction, did counsel call to the attention of this Court the bearing of the Act of 1925 upon the power to issue ancillary writs and the relevance of cases prior to that Act, and in no case did this Court apparently address itself to the problem now canvassed. Authority exercised *sub silentio* does not establish jurisdiction. Throughout its history it has been the firm policy of this Court not to recognize the exercise of jurisdiction under such circumstances as precedents

when the question is first sharply brought for decision. *United States* v. *More*, 3 Cranch 159, 172; *Snow* v. *United States*, 118 U. S. 346, 354-55; *Cross* v. *Burke*, 146 U. S. 82, 87; *Louisville Trust Co.* v. *Knott*, 191 U. S. 225, 236; *Arant* v. *Lane*, 245 U. S. 166, 170.

In deciding whether to give a latitudinarian or a restricted scope to the appellate jurisdiction of this Court, the important factor is the number of instances in which applications for the exercise of the Court's jurisdiction has been or may be made, not the number of instances in which the jurisdiction has been exercised. And so it tells little that less than ten applications for mandamus have been granted since the Act of 1925. What is far more important is that merely for the first seven Terms after that Act not less than seventy-two applications for such writs were made. Every application consumes time in consideration, whether eventually granted or denied.

Had the Court jurisdiction, this case would furnish no occasion for its exercise. On whatever technical basis of jurisdiction the availability of these writs may have been founded, their use has been reserved for very special circumstances. However varying the language of justification, these ancillary writs have been issued only to further some imperative claim of justice. In the present case, the upshot of these proceedings is to circumvent the intermediate appellate court as the natural and normal resort for relief from a claim of want of jurisdiction in the district court.

No palpable exigency either of national or international import is made manifest for seeking this extraordinary relief here. For all practical purposes the litigation has ceased to concern a vessel belonging to a sister republic. While, to be sure, the legal issues turn on the claim of sovereign immunity by Peru in a vessel libeled in an American harbor, the ship has long since been released and the actual stake of the controversy is a bond. Thus the case for our intervention, to the disregard of the Circuit Court of Appeals, cannot be put higher than the propriety of vindicating the dignity of a friendly foreign state.

But surely this is to introduce the formal elegancies of diplomacy into the severe business of securing legal rights through the judicial machinery normally adapted for the purpose. After all, if the framers of the Constitution had deemed litigation in this Court alone to comport with appropriate regard for the dignity of a friendly foreign state, they would have given this Court original jurisdiction in such cases. If our nearest neighbors

wished to litigate in this country, they could not bring suit in this Court. See *Monaco* v. *Mississippi*, 292 U. S. 313. It is not deemed incompatible with the dignity of the United States itself to begin suit in a district court, have the litigation proceed to the circuit court of appeals, and only by our leave reach this Court. See, *e. g.*, *United States* v. *California*, 297 U. S. 175. Litigation involving the interests of the United States in ships owned by it has twice recently gone through this normal process, and it will not be thought that the dignity of the United States was thereby compromised. Indeed, under the arrangements made by Congress in 1925, measures deemed indispensable for the conduct of the war could be nullified by district courts and could not come here for review until appeal was duly taken to the circuit courts of appeals. To be sure, Congress has wisely provided that once such an appeal is filed this Court in its discretion may bring the appeal here. See, *e. g.*, *White* v. *Mechanics Securities Corp.*, 269 U. S. 283; *Norman* v. *B. & O. R. Co.*, 294 U. S. 240, 294-95; *Ex parte Quirin*, 317 U. S. 1, 19-20. To require a foreign state to seek relief in an orderly fashion through the circuit court of appeals can imply an indifference to the dignity of a sister nation only on the assumption that circuit courts of appeals are not courts of great authority. Our federal judicial system presupposes the contrary. Certainly this Court should in every possible way attribute to these courts a prestige which invites reliance for the burdens of appellate review except in those cases, relatively few, in which this Court is called upon to adjudicate constitutional issues or other questions of national importance.

To remit a controversy like this to the circuit court of appeals where it properly belongs is not to be indifferent to claims of importance but to be uncompromising in safeguarding the conditions which alone will enable this Court to discharge well the duties entrusted exclusively to us. The tremendous and delicate problems which call for the judgment of the nation's ultimate tribunal require the utmost conservation of time and energy even for the ablest judges. Listening to arguments and studying records and briefs constitute only a fraction of what goes into the judicial process. For one thing, as the present law reports compared with those of even a generation ago bear ample testimony, the types of cases that now come before the Court to a considerable extent require study of materials outside the technical law books. But more important, the judgments of this Court are collective

judgments. Such judgments presuppose ample time and freshness of mind for private study and reflection in preparation for discussions in Conference. Without adequate study there cannot be adequate reflection; without adequate reflection there cannot be adequate discussion; without adequate discussion there cannot be that mature and fruitful interchange of minds which is indispensable to wise decisions and luminous opinions.

It is therefore imperative that the docket of the Court be kept down, that no case be taken which does not rise to the significance of inescapability for the responsibility entrusted to this Court. Every case that is allowed to come here which, judged by these standards, may well be left either to the state courts or to the circuit courts of appeals, makes inroads upon thought and energy which properly belong to the limited number of cases which only this Court can adjudicate. Even a judge of such unique gifts and experience as Mr. Justice Holmes felt at the very height of his powers, as we now know, the whip of undue pressure in his work. One case is not just one case more, and does not stop with being just one more case. Chief Justice Taft was not the last judge who, as he said of himself, "having a kind heart, I am inclined to grant probably more [discretionary reviews] than is wise." (Hearing before the Committee on the Judiciary, House of Representatives, 68th Cong., 2d Sess., on H. R. 8206, p. 27.)

In a case like this, we should deny our power to exercise jurisdiction. But, in any event, we should refuse to exercise it. By such refusal we would discourage future applications of a similar kind, and thereby enforce those rigorous standards in this Court's judicial administration which alone will give us the freshness and vigor of thought and spirit that are indispensable for wise decisions in the causes committed to us.

Mr. Justice Reed is of the opinion that this Court has jurisdiction to grant the writ requested, *Ex parte United States,* 287 U. S. 241, but concurs in this dissent on the ground that application for the writ sought should have been made first to the Circuit Court of Appeals.

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